

1-1-1979

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Recommended Citation

Preston Michie, *Alaskan Natives: Eskimos and Bowhead Whales: An Inquiry into Cultural and Environmental Values That Clash in Courts of Law*, 7 AM. INDIAN L. REV. 79 (1979),
<https://digitalcommons.law.ou.edu/ailr/vol7/iss1/4>

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NOTES

ALASKAN NATIVES: ESKIMOS AND BOWHEAD WHALES: AN INQUIRY INTO CULTURAL AND ENVIRONMENTAL VALUES THAT CLASH IN COURTS OF LAW

Preston Michie*

PERSPECTIVE

The solemn moment had arrived when a formal greeting had to be bestowed on the whale. . . . She poured this water first on the snout itself, then on the blowhole of the whale, remarking as she did so,

"It is good that you are come to us."

Now the umealiq¹ himself came forward. Taking the vessel from his wife, he also poured fresh water on the snout of the whale remarking as he poured,

"Here is water; you will want to drink. Next spring come back to our boat."

The wives of members of the crew then came forward and thanked the whale for allowing himself to be taken, saying,

"Kuyanaq" (Thanks!)

The umealiq now addressed the whale further, likewise offering a word of thanks, and concluded by saying,

"It is good that you have wished to come and live with us."

—Eskimo Whale Greeting²

Introduction: Endangered Culture Versus Endangered Species

The relationship of the Alaskan Eskimo to the Bowhead whale is one of hunter to hunted. Eskimos have hunted the Bowhead (*Balaena mysticetus*) for perhaps fifty centuries.³ Whaling ac-

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1. An umealiq was the captain of a whaling crew. The umealiq was the keystone for whaling activities and the associated ceremonialism. He was a boat owner by definition. Through the force of his moral character and prestige he commanded a leading role in the Eskimo whaling community. Thus he functioned in effect as a chief without defined authority beyond the relationships he developed with his crew. SPENCER, *THE NORTH ALASKAN ESKIMO: A STUDY IN ECOLOGY AND SOCIETY* 177-78 (1959) [hereinafter cited as SPENCER].

2. *Id.* at 345.

3. The exact length of time that Eskimos have pursued the Bowhead is speculative.

tivities are the dominant aspects of maritime Eskimo culture. Contact between Eskimo lifestyles and nonnative socio-political and economic systems has resulted in great stress disruptive to Eskimo culture.⁴ Largely due to overexploitation by commercial whalers, the population of Bowhead whales has decreased to the point where the very survival of the species is questionable.⁵ If the Bowhead goes the way of the passenger pigeon,⁶ then the essential feature of the whaling Eskimo culture will pass into history.

This note examines the present relationship between Bowhead whales and Eskimos, beginning with a description of the important role the Bowhead plays in the culture of the Alaskan Eskimo. The endangered status of the Bowhead is examined. Against this backdrop, international regulation of whaling and domestic control of the Bowhead via federal environmental legislation will be analyzed. The legal rights of Eskimos under existing treaties and statutes will be examined next. Finally, an attempt will be made to articulate which course the federal government ought to pursue in order to achieve a balancing of these competing interests. Special emphasis will be placed on cultural, environmental, and philosophical values throughout this discussion in order to illuminate more fully the conflicting policy dynamics at work.

The United States Department of Commerce stated that whaling dates back "several thousand years," U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT, INTERNATIONAL SUBSISTENCE HARVEST OF BOWHEAD WHALES 36 (October, 1977) [hereinafter cited as BOWHEAD EIS]. Judge Levanthal alludes to the Bowhead as a "vital element of a millenia-old Eskimo culture," *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977). Rice quotes the 50-century figure. Rice, *Whales and Whale Research in the Eastern North Pacific* in THE WHALE PROBLEM 189 (W. Scheirll ed. 1974) [hereinafter cited as Rice].

4. The increased contact in recent years resulted from growth in military, industrial, and commercial activity in the Arctic. These cultural stresses have caused personality disorders and social deviancy problems such as juvenile delinquency, violent behavior, and alcohol abuse. Contributing factors include lack of English language ability, education, and occupational skills, and the contrast in nonnative cultural values where individuality and overt emotional and verbal expression run counter to Eskimo social values. BOWHEAD EIS, *supra* note 3, at 57. For a general discussion of Eskimo responses to modern civilization, see N. CHANCE, THE ESKIMO OF NORTH AMERICA (1966), E. FOULKS, THE ARCTIC HYSTERIAS (1972), and J. HONIGMANN, ESKIMO TOWNSMEN (1965), cited in BOWHEAD EIS, *supra*, at 58.

5. A brief history of Bowhead whaling and a description of the present status of the Bowhead whale is presented in the text *infra*.

6. The passenger pigeon became extinct in the early 1900s because of loss of habitat and a lack of regulation of hunting.

*Cultural, Environmental, and Economic Considerations
Animism and the Importance of the Bowhead Whale to
the Eskimo⁷*

Aboriginal Concepts

The aboriginal Eskimo believed that all animals possessed souls.⁸ From this basic premise flows the deep, fundamental basis of Eskimo beliefs which emphasize man's smallness and powerlessness.⁹ This attitude also gives rise to a complex set of social mores and taboos that must be strictly observed.¹⁰ It is essential under the Eskimo philosophy not to offend the souls of slain animals.¹¹ "Punishment follows in the path of the deed; but if sin is publicly confessed, it is thereby atoned for."¹² The fundamental motivating force behind this approach to the quest for food is to avoid antagonizing the food supply.¹³ It is important to emphasize that this aboriginal philosophy exhibits little or no tendency to preserve game.¹⁴ An aboriginal Eskimo may carefully conserve his stored food supplies, but his view is that

7. There are, of course, Eskimos who do not engage in whaling. This discussion necessarily focuses on those who do. But it should be remembered that Eskimos are a diverse group who live in the area between Greenland and Siberia. The Bowhead, however, is found in significant numbers only off the northern coast of Alaska. Thus the geographic scope of this paper is narrow. "Eskimo" as used here means "Eskimos who hunt the Bowhead whale off the Alaskan coast."

8. In the Eskimo view, "Every object, every rock, every animal, indeed even conceptions such as sleep and food, are living." BIRKIT & SMITH, *THE ESKIMOS* 162 (1960) [hereinafter cited as BIRKIT & SMITH].

9. *Id.* at 166.

10. Rigid ceremonialism surrounded nearly every facet of an Eskimo's life. Rules governed what could or could not be eaten at certain times. Choice of clothing and handling of weapons were determined by the occasion at hand. The greatest ceremonial display is associated with whaling. *Id.* at 166-67. These strict rules were accorded great respect and rarely questioned. "Independent thought is even rarer in these latitudes than in our own." *Id.* at 161.

11. Whether he wishes to or not, the Eskimo must reckon with the spirits of the animals he kills. Animal spirits do not die at physical death. Rather, the animal's soul returns to a spiritual world where the souls of animals not yet liberated to earthly existence dwell. Returning souls keep the spiritual world of animals well informed of the conduct of men on earth. Woe to the man who encounters a past-slain, reincarnated animal spirit bearing a grudge. WEYER, *THE ESKIMOS: THEIR ENVIRONMENT AND FOLKWAYS* 333 (1969) [hereinafter cited as WEYER].

12. BIRKIT, *supra* note 8, at 166.

13. WEYER, *supra* note 11, at 333.

14. *Id.*

the supply of game is not diminished by even unrestricted slaughter, provided, of course, proper procedure is maintained.¹⁵

Animism Contrasted With Western Values

The present attitude of Western, nonnative thought is that "man is exclusively dominant," that "the cosmos is a pyramid erected to support man at its peak," and that "the world consists of a dialogue between men."¹⁶ Whatever the origin, this attitude was expressed in Judaism, absorbed by Christianity and adopted into Western ideas.¹⁷ The views of Christianity exemplify these basic concepts¹⁸:

Genesis 2:28 commands man to "be fruitful and multiply, and fill the earth and subdue it." He is also enjoined to "have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth." Without question, these are strong directives (indeed, they have become something of an obscenity for many environmentalists). . . .¹⁹

Christianity, the most anthropocentric religion the world has known,²⁰ allows man to exploit nature in a mood of indifference to the feelings of natural objects, in contrast to ancient paganism and Asia's religions.²¹ Simply put, God planned all of nature for man's benefit without any function but to serve man, who is made in God's own image.²²

15. These customs must be viewed as religious rules rather than economic laws. A dearth of game results only from a failure to observe traditional rites. *Id.* at 333.

16. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 493 (1972) [hereinafter cited as Stone], quoting from McHarg, *Values, Process and Form*, in *THE FITNESS OF MAN'S ENVIRONMENT* 213-14 (1968).

17. *Id.* at 213-14.

18. While Christianity is sharply criticized here, other philosophical views espousing unity between man and nature have had no greater effect than contrary beliefs in Europe in producing a balance between man and his environment. Murphy, *Has Nature Any Right to Life?*, 22 HAST. L.J. 476, 477 (1971). Stone writes, "I am under the impression, too, that notwithstanding the vaunted 'harmony' between the American Plains Indians and Nature, once they had equipped themselves with rifles their pursuit of the buffalo expanded to fill the technological potential." Stone, *supra* note 16, at 494.

19. Baer, *Higher Education, the Church, and Environmental Values*, 17 NAT. RES. J. 477, 486 (1977).

20. HANKS, TARLOCK & HANKS, *ENVIRONMENTAL LAW AND POLICY* 84 (1974) [hereinafter cited as HANKS, et al.], citing White, *The Historical Roots of Our Ecological Crisis*, 155 SCIENCE 1203 (1967).

21. *Id.* at 85.

22. *Id.* at 84.

Early Christians conceived nature as a symbolic system through which God revealed the Divine mentality.²³ This natural theology, originally artistic rather than scientific, emerged by the early thirteenth century as an effort to understand God's mind by discovering how His Creation operated.²⁴ The fruits of these studies coupled with existing technology permitted small, mutually hostile European nations to conquer, loot, and colonize much of the world, thus spreading Occidental philosophy to the far corners of the earth.²⁵ Every major scientist continued to explain his motivations as a venture in religious understanding until the late 1700s when the hypothesis of God finally became unnecessary to scientists.²⁶

All significant modern science and modern technology possess distinctive Western styles and methods, whatever the pigmentation or language of the scientist.²⁷ "Somewhat over a century ago science and technology . . . joined to give mankind power which, to judge by many of the ecological effects, are out of control. If so, Christianity bears a huge burden of guilt."²⁸

The basic contrast between Western thought and the Eskimo animism centers on the position man occupies in the natural scheme of things. Animism holds that man is entangled inextricably with nature's web. Western, nonnative thinking sees man as the center of the universe. However, there have been individuals, notably Saint Francis of Assisi²⁹ and Aldo Leopold,³⁰ who have expressed views more attuned to Eskimo philosophy.

23. *Id.* at 85.

24. *Id.*

25. *Id.* at 83.

26. *Id.* at 86.

27. *Id.* at 82.

28. *Id.* at 86.

29. Saint Francis of Assisi, the greatest radical in Christian history since Christ, revolted against this monarch of man. Francis believed in the virtue of humility for man as a species rather than merely as an individual. He tried to set up a democracy of all God's creatures consisting of "Brother Ant and Sister Fire, praising the Creator in their own ways as Brother Man does in his." The Franciscan doctrine was quickly extinguished. *Id.* at 86-87.

30. A. LEOPOLD, *A LAND ETHIC*: "There is as yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations. . . .

"The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. This sounds simple: do we not already sing our love for and obligation to the land of the free and the home of the brave? Yes, but just what and whom do we love? Certainly not the soil, which we are

The Importance of the Bowhead to the Modern Eskimo

Cultural Aspects. An Eskimo once declared, "Without the whale, there is no Eskimo."³¹ Whaling remains a significant subsistence activity for the seven villages located between Point Hope and Point Barrow.³² The Eskimos identify themselves as whalers.³³ Political and social organization is closely related to the whale hunt because it ties the entire village community together.³⁴ The system of sharing serves to ensure that a family will be assisted when food is scarce.³⁵

During a whale hunt, virtually the entire village participates in whaling related activities.³⁶ A substantial part of the village community will move to the ice camps from which the whaling canoes will be launched.³⁷ Although most of the whale products are consumed by members of whaling villages, up to 10,000 Eskimos and Indians living in the interior supplement their diets with whale meat.³⁸

Contributions to Health. Whale meat is the central food source during the hunting season.³⁹ "From a nutritional point of view, the meat . . . and the oil of the Bowhead are considered most important contributors to the Eskimo diet."⁴⁰ When Bowheads and

sending helter-skelter downriver. Certainly not the waters, which we assume have no function except to turn turbines, float barges, and carry off sewage. Certainly not the plants, of which we exterminate whole communities without batting an eye. Certainly not the animals, which we have already extirpated many of the largest and most beautiful species. A land ethic of course cannot prevent the alteration, management, and use of the resources but it does affirm their right to continued existence in a natural state. In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such."

31. BOWHEAD EIS, *supra* note 3, app. 1-8.

32. *Id.* at 45. There are nine whaling villages, two of which are located on offshore islands. They are Gambell and Savoonga.

33. *Id.* at 52-53.

34. Village festivals revolve around the spring hunt and its products. The activities of the hunt function as a strong stabilizing factor. The importance of the *umealiq* to the political power structure is well known to outsiders who must work within these structures in dealing with these communities. *Id.* at 53-54.

35. Much remains of traditional methods of distribution of whale carcasses. Distribution factors include "order of vessels striking and killing the animal, status on the vessel, family relationships, family social networks extending into other northwest Alaska villages, and extent of need in some cases." *Id.* at 53.

36. *Id.* at 51.

37. *Id.*

38. *Id.* at 47.

39. *Id.* at 48.

40. Three ounces of whale meat supply about 50% of the recommended allowance

other large animals such as walruses are unavailable, subsistence hunting switches to high protein animals such as rabbits.⁴¹ A high protein diet without the counterbalancing fatty acids found in whale meat and oil strains the kidneys which may lead to death by "rabbit starvation."⁴²

The extreme physical exertion of survival in such a cold, harsh climate requires a high caloric consumption, but it is also a factor that reduces the incidence of obesity.⁴³ A shortage of whale meat and oil can be especially significant because three to four months may be spent repairing equipment prior to the hunt, which may itself span an additional four or five weeks.⁴⁴ An increased dependence on commercially supplied foods, which include nutrition-poor snack foods, contributes to an increasing incidence of diabetes.⁴⁵

Attempts to substitute alternative foods when whale meat is unavailable have met with resistance based on a strong preference for traditional cultural foods.⁴⁶ A permanent loss of whale meat could precipitate a physical, psychological, and/or cultural trauma that often accompanies drastic and forced dietary changes.⁴⁷ Dr. Heller, a dietary specialist, commented:

Imported food cannot take [the] place of whale and other marine mammals . . . [which] . . . are absolutely necessary in the diets of Eskimos. If Bowhead whales were eliminated as a food source for Eskimo people, welfare costs would have to be increased. . . . I don't think such a welfare plan is sensible from a health standpoint and it would deaden the initiative of the native people.⁴⁸

Another person wrote, "Sure I'm against the senseless slaughter of any animal, yet if that animal keeps a man and his family alive, keeps them warm and instills pride in a floundering com-

of protein for an average man, 140% of the iron, and 50% of the riboflavin. Three ounces of whale oil yields 50% of the daily vitamin A recommendation. Whale products are major sources of vitamins B and D. Muktuk, skin with some fat attached, in a three-ounce portion provides about 20% of a man's daily caloric needs. *Id.* at 49-50.

41. *Id.* at 50.

42. *Id.*

43. Obesity is a known cause of heart disease which occurs frequently among Native Alaskans. *Id.* at 50-51.

44. *Id.* at 52.

45. *Id.* at 51.

46. *Id.* at 49.

47. *Id.*

48. *Id.* at 208-209.

munity, then the scales are balanced.”⁴⁹ Finally, and perhaps most importantly, whaling weaves the “old ways” into modern Eskimo life.⁵⁰

A Source of Economic Vitality

The influence of whaling on the economy of Eskimos is dramatic. About 70% of the families engaging in spring Bowhead hunting obtain most of their food this way.⁵¹ Because whaling is primarily a subsistence activity, translating the value of whale hunting into cash values is difficult if not impossible. However, whale meat is occasionally used in barter and sales of art and ceremonial items made from baleen and whale bone contribute to the available cash supply.⁵² Subsistence hunting is satisfactory to the modern Eskimo and provides meaningful labor for a large percentage of Eskimos who would otherwise be chronically unemployed.⁵³

The Bowhead's Right to Exist

Biological Data

The Bowhead whale, *Balaena mysticetus*, belongs in the class of large baleen whales.⁵⁴ The striking feature of the animal is its ponderous, bow-shaped head from which it derives its name.⁵⁵

49. *Id.* at 166.

50. The need to pass on traditional values to future generations is a significant universal cultural goal. *Id.* at 45.

51. *Id.* at 54.

52. *Id.*

53. Unemployment is exceptionally high among whaling Eskimos. Only 40% of the eligible adult population is in the labor force, and of these unemployment averaged 20% in 1970. There is an acute shortage of jobs in rural and village Alaska. Eskimos face discriminatory hiring practices and, because of a lack of marketable skills, are at a competitive disadvantage. Employment assistance programs often conflict with the organization of village life and are ineffective. Essentially they are relocation programs because jobs and training institutions are located in urban areas. Public assistance programs are eligibility restrictive. Few service programs have the capacity to take into account the subsistence lifestyle of the Eskimo. *Id.* at 54-56.

54. Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment, Part I*, 6 *ECOLOGY* L.Q. 323, 340 (1977) [hereinafter cited as Scarff]. The Bowhead is a singer! The mammal's voice resembles “something like the hoo-oo-oo of the hoot-owl, although longer drawn out, and more of a humming sound than a hoot. Beginning on F, the tune may rise to G, A, B, and sometimes to C, before slanting back to F again.” McVay, *Stalking the Arctic Whale*, 61 *AM. SCIENTIST* 24, 26 (1973) [hereinafter cited as McVay].

55. *Id.* at 24.

The largest individuals grow to 60 feet⁵⁶ and weigh approximately one ton per foot.⁵⁷ It feeds on microscopic zooplankton, krill, and other crustaceans by swimming beneath the surface with its jaws widely extended.⁵⁸ Its tongue forces water through whalebone (baleen) and thick internal hair, trapping large quantities of these marine life.⁵⁹

The Bowhead, the only great whale that resides year round in the Arctic Sea, migrates close to the Alaskan shore in spring and fall between Point Hope and Point Barrow, although exactly where its migratory routes terminate is unknown.⁶⁰ The Bowhead inhabits Arctic waters in four principal regions: (a) from Spitzberger west to east Greenland; (b) in David Strait, Bafflin Bay, Hudson Bay, and adjacent waters; (c) in the Bering, Chukchi, Beaufort, and East Siberian seas; and (d) in the Okhotsk Sea.⁶¹ Bowheads exhibit gregarious behavior, being quite content to halt their migration when the ice ahead remains unbroken and play together.⁶² Two whales, aligned some eight feet apart, sometimes lift another mature whale out of the water and hold it crosswise in the air for ten minutes or more.⁶³ Hunters often express astonishment at seeing sixty tons of leviathan crashing into the sea after jumping entirely out of the water.⁶⁴ The mother whale is

56. *Id.* at 28.

57. *Id.*

58. Scarff, *supra* note 54, at 330.

59. McVay, *supra* note 54, at 34.

60. *Id.* at 24. There is much about the Bowhead that is not well known. Mating and calving are believed to occur in April and May. Females are believed to bear a single calf every second year. The gestation period is unknown; estimates range from 9 to 14 months. Length at birth is thought to range between 10 and 14 feet. The lactation period and length of time a calf remains with its mother are unknown. Age of sexual maturity is unknown as are average and maximum longevity. BOWHEAD EIS, *supra* note 3, at 27-28.

61. BOWHEAD EIS, at 26.

62. McVay, *supra* note 54, at 29, quoting from FREUCHEN & SALOMONSEN, THE ARCTIC YEAR 179 (1958).

63. *Id.* at 34. The Bowhead seems to enjoy itself. As one whaler observed, "Sometimes the whales throw themselves into a perpendicular posture, with their heads downward, and, rearing their tails on high in the air, bent the water with awful violence. . . . The sea is thrown into foam and the air filled with vapours; the noise in calm weather, is heard to a great distance; and the concentric waves produced by the concussions on the water are communicated abroad to a considerable extent. Sometimes the whale shakes its tremendous tail in the air, which cracking like a whip, resounds to the distance of two or three miles." *Id.* at 32, quoting from SCORESBY, AN ACCOUNT OF THE ARCTIC REGIONS, WITH A HISTORY AND DESCRIPTION OF THE NORTHERN WHALE-FISHERY 467 (1820) [hereinafter cited as SCORESBY].

64. *Id.* at 29, quoting from FRENCHEN & SALOMONSEN, THE ARCTIC YEAR 179 (1958).

very protective of her young.⁶⁵ This mammal was once so common it was known simply as "The Whale."⁶⁶

Enter the Whalers

Most European nations participated in a 300-year slaughter which began in 1611 and ended as a commercial venture in 1914.⁶⁷ The peak catch occurred in 1701, when Dutch and German whalers took 2,616 animals.⁶⁸

In July 1978, Alaska Governor Jay Hammond announced the sighting of 1,700 whales along the Arctic coast.⁶⁹ These observations imply 2,264 animals passed the counting stations during the spring migrating season.⁷⁰ This number corresponds to previous estimates of 2,000 animals,⁷¹ representing less than 1% of an original projected stock of 300,000.⁷² Catch statistics dating back to 1890 indicate no population increase during the century.⁷³ Unquestionably *Balaena mysticetus* remains the most endangered whale species.⁷⁴

65. Captain Scoresby wrote: "In June of 1811, one of my harpooners struck a sucker, in the hope of its leading to the capture of the mother. Presently she arose . . . and seizing the young one dragged about a hundred fathoms of line . . . with remarkable force and velocity. Again she arose to the surface; darted furiously to and fro; frequently stopped short, or suddenly changed her direction; and gave every possible intimation of extreme agony. . . . At length, one of the boats approached so near, that a harpoon was hove at her. It hit but did not attach itself. A second harpoon was struck; but a third was more effective, and held. Still she did not try to escape; but allowed other boats to approach, so that, in a few minutes, three more harpoons were fastened; and, in the course of an hour afterwards, she was killed." *Id.* at 36, quoting SCORESBY, *supra* note 63, at 467.

66. *Id.* at 26.

67. *Id.*

68. *Id.* Some of the Arctic Alaskan trading companies continued to deal in whalebone for a few more years into the 1920s, but by the mid-1920s commercial Bowhead whaling had ended for all purposes. BOWHEAD EIS, *supra* note 3, at 44.

69. The Oregonian (Portland) at A6, col. 1 (June 30, 1978).

70. *Id.* at A6. The implied figure is derived by estimating the percentage of whales that slip by undetected because of darkness, human error, or other factors.

71. Scarff, *supra* note 54, at 332.

72. Myers, *The Whaling Controversy*, 63 AM. SCIENTIST 448, 449 (1975) [hereinafter cited as Myers]. This statistic is a bit misleading. The 300,000 figure represents the total worldwide original projected stock. It is unknown how many Bowheads are found outside the Bering Sea area. The numbers in other areas are considered to be in the hundreds. The original projected stock in the western Arctic is estimated to be about 12,260. Thus about 20% of the original stock remains if these figures are accurate. However, the Bowhead in the western Arctic are the only major stock population. BOWHEAD EIS, *supra* note 3, at 34.

73. Rice, *supra* note 3, at 189.

74. Scarff, *supra* note 54, at 400.

During the first half of this century, Alaskan Eskimos averaged an annual catch of 12 whales.⁷⁵ Recently the growing Eskimo population increased the intensity of its whaling effort, averaging 30 whales between 1971 and 1975.⁷⁶ Forty-eight whales were landed in 1976;⁷⁷ 24 in 1977;⁷⁸ 10 in 1978;⁷⁹ and 12 in 1979.⁸⁰ Unfortunately, the number of whales killed reflects the Eskimos' impact inaccurately because the estimated ratio of whales struck-but-lost to whales landed varies from 1.4:1 to 15:1.⁸¹ This "buckshot" approach to whaling slows recovery of severely depleted breeding stocks.⁸² Especially horrifying is that the percentage of struck whales landed and the utilization of whale carcasses are decreasing.⁸³

75. *Id.* at 401.

76. *Id.* The average crew has eight members. In 1976 a total of about 86 crews were active. Thus, approximately 688 men engaged directly in the hunt. BOWHEAD EIS, *supra* note 3, at 51.

77. Scarff, *supra* note 54, at 401.

78. NATIONAL OCEANIC & ATMOSPHERIC AD., A SPECIAL REPORT TO THE INTERNATIONAL WHALING COMMISSION: BOWHEAD WHALES 3 (1978) [hereinafter cited as SPECIAL REPORT].

79. *Id.* The dramatic reduction in whales taken and whales struck-but-lost is due in part to regulations adopted by the National Marine Fisheries Service in 1977 to implement the Bowhead quotas established by the International Whaling Commission in December 1977. See text accompanying notes 177 *et seq.*

80. 44 Fed. Reg. 59,912 (Oct. 17, 1979).

81. Scarff, *supra* note 54, at 401. The following figures are found in SPECIAL REPORT, *supra* note 78, at C-6:

year	1973	1974	1975	1976	1977	1978	1979	Total
whales struck	47	51	43	91	111	15	27	385
whales struck-but-lost	10	31	28	43	87	5	15	219
whales landed	37	20	15	48	24	10	12	166
ratio struck-but-lost/ landed	0.27	1.55	1.87	0.90	3.63	0.50	1.25	1.32

Traditional methods of whaling involved the use of harpoons and lances fashioned from stone, ivory, and bone. Modern Eskimos have adopted gear and techniques introduced by commercial whalers. Darting and shoulder guns employing exploding bombs are now incorporated into traditional village hunts. The best estimates indicate that commercial whalers of the late 1800s were more efficient than the modern Eskimo. Professional whalers reported struck-but-lost to landed whales ratios of from 33% to 20% whereas the modern Eskimo is thought to be about 50% efficient; the best scientific judgments suggest that 50% of the struck-but-lost whales ultimately die. Redesigning of the barb and its component parts has been suggested as changes that would improve the efficiency of Eskimo hunters. BOWHEAD EIS, *supra* note 3, at 40-43.

82. McVay, *supra* note 54, at 26.

83. Scarff, *supra* note 54, at 402.

Environmental Values

The question is raised, "Why protect whales or any other species from extinction?" The answer to this question is multi-dimensional. From the Eskimos' perspective, saving the Bowhead from extinction is synonymous with saving their culture. Professor Rawls writes, "persons in different generations have duties and obligations to one another just as contemporaries do."⁸⁴ Chief Justice Burger cited the need to preserve genetic variations which may yield unknown benefits.⁸⁵ Congress noted that marine mammals are "resources of great international significance, aesthetic and recreational as well as economic. . . ,"⁸⁶ and that encouraging conservation programs is "a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife."⁸⁷ Finally, a sportsman declared, "saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together, and the interaction of life forms. When fishermen rise up united to save the pupfish, they can save the world as well."⁸⁸

A Commercial Whaler Speaks: The Japanese View

Even though no commercial hunting of Bowhead whales exists, the views of commercial whalers represent three important facets of the present controversy. First, the history of the Bowhead's relationship to man involves attitudes mirrored by the present

84. HANKS, et al., *supra* note 20, at 14, quoting from RAWLS, A THEORY OF JUSTICE 284 (1971).

85. TVA v. Hill, 437 U.S. 153 (1978) ["The Snail Darter Case"]: "From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

"To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulations in humans was found in a common plant. Once discovered and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we knew of its potentialities—we would never have tried to synthesize it in the first place.

"Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious."

86. Marine Mammal Protection Act, 16 U.S.C. § 1651(5) (1976).

87. Endangered Species Act, 16 U.S.C. § 1531(5) (1976).

88. HANKS, et al., *supra* note 20, quoting from FIELD & STREAM 74 (Dec. 1971).

Japanese position.⁸⁹ Second, the selfish motives of commercial hunters resemble the driving force of Eskimo animism which exhibits little or no tendency toward conservation.⁹⁰ Third, and most important, the continued whaling of other species may be affecting the Bowhead's ability to recover to its former levels because a spectrum of factors, such as interspecific interaction between whales through common food stocks, become increasingly important as little understood marine ecosystems are exploited intensively.⁹¹

Perhaps the best explanation for the intensive exploitation of common resources is given by Myers:

Because whales live in an environmental commons, they constitute a common property resource, one which is not subject to clearly defined property rights on the part of an individual or a group. This situation frequently induces commercial interests to exploit a resource without paying appropriate costs: in economic terms, they operate at rent zero. This means they have no incentive not to misuse the resource.⁹²

Whale meat, which costs less than meat from conventional livestock, supplies a significant portion of the Japanese meat intake. If the cost were to approximate that of domestic livestock production, and the subsidy provided by whale oil and other products were removed, the incentive to continue whaling would be

89. Actually the Japanese attitude is typical of exploiters of common resources. See note 92 *infra*. The Japanese attitude is the same as early American whalers' and modern fishermen's attitudes. Myers, *supra* note 72, at 452.

90. WEYER, *supra* note 11, at 333.

91. Myers, *supra* note 72, at 453.

92. *Id.* at 449. The problem of common ownership of natural resources is illustrated by the classic example of a pasture in which several herdsman may keep as many cattle as each wishes. Since each herdsman seeks to maximize his gain, he concludes that adding one more cow will yield a utility value of +1 because he will receive all the proceeds from the sale of that additional animal. But the cost, -1, will be distributed among all the herdsman and hence the net negative effect felt by the individual herdsman is only a fraction of the true cost. Even where the pasture is already overgrazed, the pro rata sharing of the cost will still lead a rational herdsman to conclude that adding still another cow is beneficial to his own interests. The result, of course, is eventual ruin. HARDIN & BODEN, *MANAGING THE COMMONS* 20 (1977), citing Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). Baxter writes: "[W]herever we encounter a situation where ownership rights are imprecisely defined—where what a man owns is his only when and because he grabs it first—then all normal incentives for private conservation are destroyed and the resource will be exploited at an excessive and wasteful rate." BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* 34 (1974).

diminished.⁹³ At least in the international arena, the economic reality of whaling dominates thinking.

The Japanese believe that an abrupt halt to whaling based on appeals to morality about vanishing species does not reflect the reality of international law which functions by the rules of national economic self-interest.⁹⁴ The whaling skipper certainly ravages world resources no more than an affluent American who jets 50,000 miles a year, operates a second car, and engages in unrestricted consumption.⁹⁵ The hypocrisy of Americans advocating whale conservation on the one hand, while on the other hand allowing fishing concerns to deplete various fish species by employing purse seining methods which drown extraordinarily large numbers of dolphins, galls the Japanese into thinking that they do not engage in reckless overexploitation of scarce resources any more than do their critics.⁹⁶

Japan's rationale for continuing whaling depends on an economic rule: extract as much on current investment as possible before world opinion finally halts operations.⁹⁷ A moratorium would direct capital to other uses, thus absorbing the entire industry,⁹⁸ but were the Japanese voluntarily to withdraw other nations might well continue whaling because the reduced competition would spur monopolistic tendencies by allowing whaling to continue as a profitable enterprise.⁹⁹ Reestablishing the industry would be economically unsound due to the necessarily large investment and increased risk of reduced catches.¹⁰⁰

Legal Considerations

International Regulation of Whaling: Its History and Current Status

In 1926 Norweigan whaling interests, seeking to curtail expansion within the industry, initiated conservation efforts through

93. Myers, *supra* note 72, at 451.

94. *Id.* at 452.

95. *Id.*

96. *Id.*

97. *Id.* at 452-53. The economics of whale exploitation are discussed extensively in Scharff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment, Part II*, 6 *ECOLOGY L.Q.* 571 (1977).

98. *Id.* at 453.

99. *Id.*

100. *Id.*

the use of permits.¹⁰¹ The regulations adopted ignored the urgency of the biological situation by failing to establish harvest quotas, limitations on the number of ships, or the length of the whaling season.¹⁰² Subsequent treaties remained mostly form without substance because the only effective quota, based on production of whale oil, was not used and improvements in fishing techniques more than compensated for other limitations.¹⁰³ World War II provided a brief reprieve and a tremendous opportunity for whale conservation.¹⁰⁴ The willingness of whaling nations to establish international regulatory agencies peaked.¹⁰⁵ The first postwar conference in January 1944 produced a modification of the "blue whale unit"¹⁰⁶ which, although reflecting estimated sustainable yields from all commercial species, inadequately accounted for the relative ease of catching larger species and changes in the economic values for particular species.¹⁰⁷ The disastrous 1945 season, when nine expeditions operated,¹⁰⁸ left little doubt that whale stocks had not recovered to their former abundance as anticipated. In 1946, fourteen nations,¹⁰⁹ including all major whaling nations, formed the International Whaling Commission.¹¹⁰

The IWC was empowered to adopt regulations fixing:

- (a) protected and unprotected species;
- (b) open and closed seasons;
- (c) open and closed waters, including the designation of sanctuary areas;
- (d) size limitations for each species;
- (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season);

101. Griffis, *The Conservation of Whales*, 5 CORNELL INT'L L.J. 99, 102 (1972) [hereinafter cited as Griffis].

102. *Id.* at 102.

103. *Id.*

104. Scarff, *supra* note 54, at 351.

105. *Id.*

106. *Id.*

107. *Id.* at 352.

108. *Id.*

109. The original signors were Australia, Brazil, Canada, Chile, Denmark, France, The Netherlands, New Zealand, Norway, Peru, U.S.S.R., United Kingdom, United States, and South Africa. As of October 1976, Peru and Chile were no longer members but Argentina, Iceland, Japan, Mexico, and Panama were still members. *Id.* at 353.

110. The Int'l Convention for the Regulation of Whaling with Schedule of Whaling Regulations, 62 Stat. 1717, T.I.A.S. No. 1849, 169 U.N.T.S. 366 (Dec. 2, 1946).

- (f) types and specifications of gear and appliances which may be used;
- (g) methods of measurement; and
- (h) catch returns and other statistical and biological records.¹¹¹

Enforcement depended on an international corps of neutral observers established in 1956 and replaced the old system of self-regulation.¹¹² Unfortunately actions by various members delayed implementing the observer system until 1971.¹¹³ A committee of four scientists formed in 1962 reported on the condition of the various stocks and recommended future limits.¹¹⁴ The system would probably have effectuated IWC goals of conservation barring cheating.¹¹⁵ However, persistent feuding between nations as to quotas, continual rejection of advice on the condition of stocks, and a blind determination to follow economic self-interests prompted one observer to bleakly remark in 1965 that the IWC can "merely slow down the trend towards the extinction of all whale stock in the Antarctic."¹¹⁶

Considerable efforts to reduce quotas resulted in the establishment in 1965 of a quota which, after twenty-one years of IWC regulation, finally was less than scientific estimates of the sustainable yields.¹¹⁷ In 1968 scientists realized that they had underestimated the age of sexual maturity for several species. This overestimation of recruitment rates¹¹⁸ necessitated lowering quotas by as much as 20%.¹¹⁹

The United Nations Conference on the Environment, meeting at Stockholm in 1972, unanimously (the whaling nations abstained) adopted Resolution 33: "It is recommended that governments agree to strengthen the IWC to increase international research efforts, and as a matter of urgency to call for an international agreement under the auspices of the IWC and involving all

111. Griffis, *supra* note 101, at 106.

112. *Id.* at 107.

113. Scarff, *supra* note 54, at 367.

114. Griffis, *supra* note 101, at 108.

115. *Id.* at 107.

116. *Id.* at 109.

117. Scarff, *supra* note 54, at 366.

118. Recruitment rate is the rate at which young adolescent individuals reach sexual maturity. In a stable, unexploited population, the number of new recruits exactly balances with the mortality rate. For a discussion of whale management based on recruitment rates, see Gambell, *The Unendangered Whale*, 250 NATURE 454 (1974), and Gambell, *Why all the Fuss About Whales?*, 22 NEW SCIENTIST 674 (1972).

119. Scarff, *supra* note 54, at 366.

governments concerned for a 10 year moratorium on commercial whaling.¹²⁰ This rebuke by the world community provided the impetus to the IWC to vote in 1973 to phase out Antarctic finwhaling by 1976.¹²¹ Both Japan and Russia formally objected,¹²² triggering a wave of international protest culminating in a boycott of all Japanese and Soviet imports by conservation, humane, and environmental groups.¹²³ At the 1974 meeting an Australian proposal set out new, more precise, and more ecologically sound guidelines as a policy framework for the determination of animal harvest quotas.¹²⁴ The plan classified each species into one of three categories: Sustained Management Stocks—those exactly at maximum sustainable yield levels, Initial Management Stocks—those above that level, and Protection Stocks—those below the Sustained Management Stock level.¹²⁵ This amendment constituted the strongest and most specific commitment to conservation that the IWC had ever taken.¹²⁶ 1975 and 1976 yielded significant gains as the Scientific Committee's advice gained acceptance without formal objection.¹²⁷

Domestic Control of Whales

The Whaling Convention Act of 1949¹²⁸ incorporated the IWC regulations into the United States Code. "It shall be unlawful for any person subject to the jurisdiction of the United States to engage in whaling in violation of the convention or of any regulations of the Commission. . . ."¹²⁹ Thus the power over the future

120. *Id.* at 367.

121. *Id.* at 368.

122. *Id.* at 368-69.

123. *Id.* at 369.

124. *Id.*

125. *Id.*

126. *Id.* at 370.

127. *Id.*

128. 16 U.S.C. §§ 916 *et seq.* (1976).

129. 16 U.S.C. § 916 (1976): "(a) It shall be unlawful for any person subject to the jurisdiction of the United States (1) to engage in whaling in violation of the convention or of any regulation of the Commission, or of this chapter, or of any regulation of the Secretary of Commerce; (2) to ship, transport, purchase, sell, offer for sale, import, export, or have in possession any whale or whale products taken or processed in violation of the convention, or of any regulation of the Commission, or of this chapter, or of any regulation of the Secretary of Commerce; (3) to fail to make, keep, submit, or furnish any record or report required of him by the convention, or by any regulation of the Commission, or by any regulation of the Secretary of Commerce, or to refuse to permit any officer authorized to enforce the convention, the regulations of the Commission, this

of whales stems from an international source that must be viewed as prescribing an upper bound on the quantity of whaling activity permitted.

The passage of the Marine Mammal Protection Act¹³⁰ brought whales within a domestic statutory scheme clearly designed to create the authority to conserve these creatures: "There shall be a moratorium on the taking . . . of marine mammals. . . ."¹³¹ The

chapter, and the regulations of the Secretary of Commerce, to inspect such record or report at any reasonable time.

"(b) It shall be unlawful for any person or vessel subject to the jurisdiction of the United States to do any act prohibited or to fail to do any act required by the convention, or by this chapter, or by any regulation adopted by the Commission, or by any regulation of the Secretary of Commerce. 16 U.S.C. § 916C (1976).

"When used in this chapter—

"Person: The word 'person' denotes every individual, partnership, corporation, and association subject to the jurisdiction of the United States.

"Whaling: The word 'whaling' means the scouting for, hunting, killing, taking, towing, holding onto, and flensing of whales and the possession, treatment, or processing of whales or of whale products.

"Convention: The word 'convention' means the International Convention for the Regulation of Whaling signed at Washington under date of December 2, 1946, by the United States of America and certain other governments.

"Commission: The word 'Commission' means the International Whaling Commission established by article III of the convention.

"Regulations of the Commission: The words 'regulations of the Commission' means the whaling regulations in the schedule annexed to and constituting a part of the convention in their original form or as modified, revised, or amended by the Commission from time to time, in pursuance of article V of the convention.

"Whale products: The words 'whale products' mean any unprocessed part of a whale and blubber, meat, bones, whale oil, sperm oil, spermaceti, meal, and baleen.

"Vessel: The word 'vessel' denotes every kind, type, or description of water craft or contrivance subject to the jurisdiction of the United States used, or capable of being used, as a means of transportation."

130. 16 U.S.C. §§ 1361 *et seq.* (1976).

131. 16 U.S.C. § 1371 (1976): "(a) There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases: . . .

"(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 1372, 1373, 1374, and 1381 of this title permitting and governing such taking and importing, in accordance with such determinations. Provided, however, That the Secretary, in making such determinations, must be assured that the taking of such marine mammals is in accord with sound principles of resource

authority granted permits the establishment of a lower bound of whaling activity. As long as the level of hunting permitted by the Secretary of Commerce is less than that permitted by IWC regulations there is no breach of international obligations even should the Secretary prescribe a complete ban.

Authority exists through the Endangered Species Act of 1973 for the Secretary of Commerce to regulate endangered species.¹³²

protection and conservation as provided in the purposes and policies of this chapter.

“(a) Except as provided in sections 1371, 1373, 1374, 1381, and 1383 of this title, it is unlawful—

“(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

“(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this sub-chapter or by any statute implementing any such treaty, convention, or agreement—

“(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

“(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

“(3) for any person, with respect to any marine mammal taken in violation of this subchapter—

“(A) to possess any such mammal; or

“(B) to transport, sell, or offer for sale any such mammal or any marine mammal product made from any such mammal; 16 U.S.C. § 1372 (1976).

“For the purposes of this chapter—

“The term ‘moratorium’ means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products, except as provided in this chapter.

“The term ‘marine mammal’ means any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or (B) primarily inhabits the marine environment (such as the polar bear); and, for the purposes of this chapter, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.

“The term ‘marine mammal product’ means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal. 16 U.S.C. § 1362 (1976).”

132. 16 U.S.C. §§ 1531 *et seq.* (1976) (as amended by Pub. L. 95-632 (1978)).

“(a)(1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

“(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

“(2) overutilization for commercial, sporting, scientific, or education purposes;

“(3) disease or predation;

“(4) the inadequacy of existing regulatory mechanisms; or

“(5) other natural or manmade factors affecting its continued existence. . . .” 16 U.S.C. § 1533 (1976).

“The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta

Every list ever compiled under this statute included *Balaena mysticetus* as an endangered species.¹³³

Continuing congressional concern for protecting whales manifested itself in the passage of the Whale Conservation and Protection Study Act,¹³⁴ which commands the Secretary of Com-

determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man. . . .

"The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

"The term 'person' means in individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government." 16 U.S.C. § 1532 (1976).

133. Scarff, *supra* note 54, at 403 n.433. The Bowhead is listed as an endangered species at 50 C.F.R. § 17.11.

134. 16 U.S.C. §§ 917 *et seq.* (1976): "§ 917. Congressional findings

"The Congress finds that—

"(1) whales are a unique resource of great aesthetic and scientific interest to mankind and are a vital part of the marine ecosystem;

"(2) whales have been overexploited by man for many years, severely reducing several species and endangering others;

"(3) the United States has extended its authority and responsibility to conserve and protect all marine mammals, including whales, out to a two hundred nautical mile limit by enactment of the Fishery Conservation and Management Act of 1976;

"(4) the conservation and protection of certain species of whales, including the California gray, bowhead, sperm, and killer whale, are of particular interest to citizens of the United States;

"(5) increased ocean activity of all types may threaten the whale stocks found within the two-hundred mile jurisdiction of the United States and added protection of such stocks may be necessary;

"(6) there is inadequate knowledge of the ecology, habitat requirements, and population levels and dynamics of all whales found in waters subject to the jurisdiction of the United States; and

"(7) further study of such matters is required in order for the United States to carry out its responsibilities for the conservation and protection of marine mammals.

"§ 917a. Study by Secretary of Commerce; report to Congress

"The Secretary of Commerce, in consultation with the Marine Mammal Commission and the coastal States, shall undertake comprehensive studies of all whales found in waters subject to the jurisdiction of the United States, including the fishery conservation zone as defined in section 1802(8) of this title. Such studies shall take into consideration all relevant factors regarding (1) the conservation and protection of all such whales, (2) the distribution, migration patterns, and population dynamics of these mammals, and (3) the effects on all such whales of habitat destruction, disease, pesticides and other chemicals, disruption of migration patterns, and food shortages for the purpose of developing adequate and effective measures, including appropriate laws and regulations, to conserve and protect such mammals. The Secretary of Commerce shall report on such studies, together with such recommendations as he deems appropriate, including suggested legislation, to the Congress no later than January 1, 1980."

merce to undertake comprehensive study of marine ecosystems. However, Congress has never appropriated funds to implement this act.¹³⁵

The IWC classifies the Bowhead as a protection stock, which is defined as a stock which is below 10% of maximum sustainable yield,¹³⁶ and prohibits the taking of whales classified as protection stocks.¹³⁷ Before the Secretary may permit the taking of marine mammals under authority of the Marine Mammal Protection Act (MMPA), he "must be assured that the taking of such marine mammals is in accord with sound principles of resource protection and conservation. . . ."¹³⁸ It is doubtful the taking of

135. Letter from William Aron, Director, Office of Marine Mammals/Endangered Species, to author (Nov. 28, 1979). However, the National Marine Fisheries Service has conducted considerable research on whales, whale behavior, and whale habitat. *Id.*

136. BOWHEAD EIS, *supra* note 5, at 7. Minimum sustainable yield is best explained by thinking in terms of pastured sheep. If no sheep are butchered, the population will increase until the food limits of the pasture are reached (the population of an unexploited herd). At this point the recruitment rate (the rate at which adolescent sheep enter adulthood) equals the death rate. The farmer has two goals: (a) he wishes to harvest sheep at a constant rate (sustained yield), and (b) he wishes to maintain his herd at a constant population so he does not have to buy other farmers' sheep to maintain his herd. If the farmer chooses to maintain a population near the unexploited (natural) level, he has a low sustained yield because nearly all the recruited individuals are needed to sustain the herd's population. Therefore, the less the population, the higher the sustained yield. However, at some point the herd size is too small to produce many new lambs. Obviously if he has only two sheep his sustained yield is very limited. Consequently, somewhere between zero and an unexploited population lies a population which yields a maximum sustainable yield (MSY). For whales the MSY population is thought to be about 50% of the unexploited population. Thus if the Arctic Sea can support 12,000 Bowhead whales naturally, then an MSY population of 6,000 Bowheads would maximize the harvesting rate of surplus animals (recruitment rate less natural death rate). See Gambell, *Why All the Fuss About Whales?*, NEW SCIENTIST 674 (June 22, 1972).

137. BOWHEAD EIS, *supra* note 3, at 7.

138. 16 U.S.C. § 1371 (1976), reprinted in part, *supra* note 131. The terms "conservation" and "management" mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at the optimum carrying capacity of their habitat. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

The term "optimum carrying capacity" means the ability of a given habitat to support the optimum sustainable population of a species or population stock in a healthy state

Bowheads would meet this standard. The Endangered Species Act (ESA) explicitly prohibits the taking of endangered species.¹³⁹ Thus the Bowhead seems amply protected by international and domestic legislation. Then how can Eskimos continue to hunt Bowheads?

Eskimo Whaling Rights Under International and Domestic Law

In the absence of a treaty right,¹⁴⁰ federal statutes are binding on Native Americans.¹⁴¹ Thus Eskimos are subject to the Whaling Convention Act (WCA), the Marine Mammal Protection Act (MMPA), and the Endangered Species Act (ESA).

Subject to the limitation that whale meat and products be consumed locally, IWC regulations permit the taking of Bowhead whales by Eskimos.¹⁴² Prior to 1977, no IWC quotas on the taking of Bowhead whales existed. In December 1977 the IWC established quotas and subsequently the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration published regulations on the taking of Bowheads.¹⁴³

The MMPA does not apply to Eskimos' taking of Bowhead whales provided that such taking is for the purpose of (a) "subsistence" and (b) "creating and selling authentic native articles of handicrafts and clothing."¹⁴⁴ A further limitation is that the taking may not be "accomplished in a wasteful manner."¹⁴⁵

without diminishing the ability of the habitat to continue that function. 16 U.S.C. § 1632 (1972).

139. 16 U.S.C. § 1538 (1976), reprinted in part, *supra* note 132.

140. There do not appear to be any treaties dealing with the Eskimos' right to engage in whaling.

141. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974); *Tlinglet & Haida Indians v. United States*, 389 F.2d 778 (Ct. Cl. 1968).

142. The taking of Bowhead whales "by aborigines or a Contracting Government on behalf of aborigines is permitted but only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines." BOWHEAD EIS, *supra* note 3, at 7.

143. See text accompanying notes 174-177.

144. 16 U.S.C. § 1371(b) (1976): "(b) The provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking. . .

"(1) is for subsistence purposes by Alaskan natives who reside in Alaska, or

"(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term 'authentic native articles of

The ESA similarly exempts Eskimos from inclusion within the ESA.¹⁴⁶ Any taking of Bowheads may not be "accomplished in a wasteful manner."¹⁴⁷ A Bowhead may be taken for the purpose of subsistence.¹⁴⁸ However, whereas the MMPA permits the taking of Bowheads for handicraft and clothing purposes,¹⁴⁹ the ESA does not recognize such purposes, but does permit the conversion of nonedible byproducts into articles of handicraft and clothing.¹⁵⁰ The MMPA permits the sale of whale meat (a) "in native villages and towns in Alaska" or (b) "for native consumption."¹⁵¹ The ESA permits the sale of whale meat "in native villages and towns in Alaska for native consumption within native villages or towns."¹⁵² Thus the ESA is more restrictive of the sale

handicrafts and clothing' means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and

"(3) in each case, is not accomplished in a wasteful manner."

145. *Id.*

146. 16 U.S.C. § 1539(e) (1976): "(e)(1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—

"(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

"(B) any non-native permanent resident of an Alaskan native village; if such taking is primarily for subsistence purposes. Non-edible by-products of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

"(2) Any taking under this subsection may not be accomplished in a wasteful manner.

"(3) As used in this subsection—

"(i) The term 'subsistence' includes selling any edible portion of fish or wildlife in native villages or towns in Alaska for native consumption within native villages or towns; and

"(ii) The term 'authentic native articles of handicrafts and clothing' means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, sewing, lacing, beading, drawing, and painting."

147. *Id.* at (e)(2).

148. 16 U.S.C. § 1539(e)(1) (1976), reprinted in full, *supra* note 146.

149. 16 U.S.C. § 1371(b)(2) (1976), reprinted in full, *supra* note 144.

150. 16 U.S.C. § 1539(e)(1) (1976), reprinted in full, *supra* note 146.

151. 16 U.S.C. § 1371(b)(2) (1976), reprinted in full, *supra* note 144.

152. 16 U.S.C. § 1539(e)(3)(i) (1976), reprinted in full, *supra* note 146.

of whale meat than is the MMPA.¹⁵³ It is important to note that the WCA, the MMPA, and the ESA operate independently. Thus an exemption under one statute cannot be invoked to make the other statutes inapplicable to Eskimos.¹⁵⁴

A single question remains to be answered, "Does the Bowhead have any rights under these exemptions?" The answer is yes. The MMPA grants authority to the Secretary of Commerce to regulate Eskimo whaling if the Secretary determines that the Bowhead is "depleted."¹⁵⁵ Depleted means the population stock (a) has declined to a significant level over a period of years; (b) has declined to the point where the species is likely to be listed as an endangered species pursuant to the ESA; or (c) has declined below the specimen's optimum carrying capacity.¹⁵⁶ The ESA permits the Secretary to regulate Eskimo whaling whenever he determines that "such taking materially and negatively affects the . . . endangered species."¹⁵⁷ Prior to June 1977, the Secretary had

153. Presumably a nonnative could purchase whale meat in an Eskimo village without violating the terms of the MMPA. However, such a sale would be illegal under the ESA.

154. BOWHEAD EIS, *supra* note 3, at 22.

155. 16 U.S.C. § 1371(b) (1976): "Notwithstanding the preceding provisions of this subsection, when, under this chapter, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this chapter. Such regulations shall be prescribed after notice and hearing required by section 1373 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared."

156. 16 U.S.C. § 1362(1) (1976): "The term 'depletion' or 'depleted' means any case in which the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter II of this chapter, determines that the number of individuals within a species or population stock—

"(A) has declined to a significant degree over a period of years;

"(B) has otherwise declined and that if such decline continues, or is likely to resume, such species would be subject to the provisions of the Endangered Species Act of 1973; or

"(C) is below the optimum carrying capacity for the species or stock within its environment."

157. 16 U.S.C. § 1539(e)(4) (1976): "(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical

not regulated Eskimo whaling under either the MMPA or the ESA. In June 1977, a proposed determination that Bowhead whales had become a depleted species throughout its range as defined by the MMPA was published in the *Federal Register*.¹⁵⁸

*Adams v. Vance*¹⁵⁹

Summary of Facts

In July of 1977, the IWC banned Eskimo hunting of the Bowhead, subject to objection by the United States. Four days before the deadline for objection, Secretary of State Vance decided not to object. The Eskimos sued, and the district court ordered Secretary Vance to object. On appeal the Eskimos claimed the Secretary's decision violated the United States' trust obligation to the Eskimos.¹⁶⁰ As trustee the United States is obligated to protect Eskimo rights.¹⁶¹ The court noted that the right to engage in whaling was implicitly granted by the MMPA and ESA.¹⁶²

description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this chapter. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 1373 of this title, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared."

158. 42 Fed. Reg. 29,946 (June 10, 1977). At the time of the IWC action, the United States had begun developing a comprehensive research program and conservation regime to control subsistence hunting to present to the IWC's scientific committee at its November 1977 meeting. Proposed regulations were published on Nov. 25, 1977, under authority of the Marine Mammal Protection Act. 42 Fed. Reg. 60,185.

The purposes of the scheme were "to preserve the central elements of the Eskimo culture and to conserve the bowhead whale stocks." 43 Fed. Reg. 13,884 (Apr. 3, 1978). In light of subsequent action by the IWC limiting the taking of Bowhead whales (see text *infra*) the proposed regulations were withdrawn.

159. 570 F.2d 950 (D.C. Cir. 1977). Jacob Adams is the present chairman of the Alaskan Eskimo Whaling Commission. See text *infra*.

160. The trust obligation theory holds that Eskimo land, fishing rights, and whaling rights are held in trust by the federal government for the benefit of the Eskimos. For a comprehensive discussion of the history and present status of the federal trust responsibility, see Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) [hereinafter cited as Chambers].

161. The Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1603 *et seq.* (1976), extinguished aboriginal fishing rights but left intact the obligation of the United States as trustee to protect the subsistence of Eskimos. Aleut Community v. United States, 480 F.2d 831 (1973).

162. *Adams v. Vance*, 570 F.2d 950, 953 n.3 (D.C. Cir. 1977).

The Decision

The court held for the Secretary of State. The lower court had assumed that an objection would not harm the United States because the objection could be withdrawn.¹⁶³ However, the circuit court found that this assumption was clearly erroneous¹⁶⁴:

The District Court misconceived entry of a formal objection to the IWC action here as one which could easily be reversed. The United States has been active in persuading other countries to abide by the restrictions of the whaling agreement, notwithstanding severe impact on their domestic concerns. No other nation has entered an objection to an IWC action since 1973, and the symbolic impact of the United States being the first nation to break that pattern was assessed by cognizant U.S. officials and others as likely to be quite grave.¹⁶⁵

The court further found that the injunction ordering Secretary Vance to object was "an unwarranted intrusion on executive discretion in the field of foreign policy."¹⁶⁶ However, the court did not hold that the controversy was a nonjusticiable political question.¹⁶⁷ Rather, the court, assuming the requested relief was justiciable, held that plaintiff did not make the "extraordinarily strong showing" of irreparable injury necessary to succeed.¹⁶⁸ The court stated that "while the ban on whaling may indeed cause irreparable injury to the Eskimos, that injury is by no means certain."¹⁶⁹ The ban came too late to appreciably affect the fall whaling season.¹⁷⁰ The Secretary planned to seek IWC

163. *Id.* at 953.

164. *Id.*

165. *Id.* at 956. The Honorable Patsy Mink, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, testified: "A United States objection at this time would seriously weaken the effectiveness of the International Whaling Commission as an instrument of conservation. . . . It is possible that an objection by the United States at this time could lead to a cycle of objections by others which would damage the effectiveness of the established quota system. If this should ensue, a number of whale species would soon face extinction." *Id.* at n.13.

166. *Id.* at 952.

167. *Id.* at 954. The Secretary claimed that the decision to object was within the foreign affairs prerogative which precludes judicial resolution, *id.* at 954, citing *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Jensen v. National Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975).

168. *Adams v. Vance*, 570 F.2d 950, 955 (D.C. Cir. 1977).

169. *Id.*, at 957.

170. *Id.*

reconsideration of its ban at the December 1977 meeting.¹⁷¹ At worst, the court thought, if reconsideration came to naught, the injury would last one year, at which time the United States could file a formal objection.¹⁷² Further contingent reserves and United States assistance were available for mitigation of injury.¹⁷³

Adams v. Vance suggests that the trustee responsibility is difficult to enforce when it conflicts with the conduct of foreign affairs. This is a fortunate development for the Bowheads provided that (1) the IWC action and (2) the position of the executive branch on whales are conservation minded. If the IWC were to sanction commercial whaling of the Bowhead, the interests of both Eskimos and Bowhead would be adversely affected. *Adams v. Vance* implies that the President would possess the discretionary authority not to object in such a situation and that Eskimos may have difficulty overturning his decision.

A Footnote to Adams v. Vance

At the December 1977 meeting of the IWC, Secretary Vance sought a reconsideration of its ban on subsistence hunting of Bowheads by Eskimos.¹⁷⁴ Vance cited the shared concern of all nations for unique native cultures and the United States' steps toward domestic regulation of whaling.¹⁷⁵ On December 7, 1977, the IWC changed its position to permit subsistence hunting by Alaskan natives of a limited number of Bowhead whales,¹⁷⁶ but the controversy was not settled.¹⁷⁷

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. National Marine Fisheries Service, Final Rule, Taking of Bowhead Whales by Indians, Aleuts, or Eskimos for Subsistence Purposes, 43 Fed. Reg. 13,883, 13,884 (Apr. 3, 1978).

177. "Eskimos Walk Out of Whale-kill Meeting in Huff

"An Alaskan Eskimo delegation Thursday walked out of the International Whaling Commission's meeting here in a dispute over the number of bowhead whales the Eskimos may kill.

"The Alaskan Eskimo Whaling Commission, formed to lobby the IWC for a higher quota of bowheads, had proposed to the commission that they be allowed to take 37-45 of the whales in the season beginning this fall.

"But an IWC technical committee voted 7-6 Wednesday night to recommend a quota of 24 bowheads for the Eskimos.

"In a statement to the IWC circulated here, the Alaskans said they now do not feel bound by the commission's rulings and would take as many bowhead whales next season

Establishment of Bowhead Whaling Quotas

In December 1977, the IWC amended its Schedule to the Convention¹⁷⁸ to allow a limited taking of Bowhead whales from the Bering Sea stock: 12 whales landed or 18 whales struck, whichever occurs first.¹⁷⁹ In April 1978, the National Marine Fisheries Service (NMFS) established a village-by-village quota scheme.¹⁸⁰ NMFS stated:

Participation in this hunt is an essential element of the Eskimo culture, which has remained substantially unchanged for centuries. The cultural aspect of the hunt pervade the entire Eskimo community, and are of paramount significance to the social structure of each village. A system, which provides an opportunity of meeting these needs, is consistent with the intent of the commission to recognize the cultural and subsistence needs of Alaskan Eskimos.¹⁸¹

NMFS observed that "no system of regulation would be successful without the cooperation of that segment of society which is being regulated."¹⁸² NMFS cited the need to provide a fair op-

as they feel necessary to meet their nutritional and cultural needs. . . .

"The United States, an IWC member but no longer a commercial whaling nation, had favored the quota of 24 bowheads, arguing that this would meet the Eskimos' subsistence needs and still allow the bowheads to reproduce and maintain their population. . . ." The Oregonian (Portland), at A5, col. 1 (June 30, 1978).

178. The Schedule to the Convention contains the regulations adopted by the IWC. Pursuant to Section 916K of the Whaling Convention Act, amendments to the schedule must be published in the *Federal Register*. The revised Schedule, as amended, was published in the *Federal Register* on Mar. 8, 1978. 43 Fed. Reg. 9481.

179. 43 Fed. Reg. 9486 (Mar. 8, 1978).

180. 43 Fed. Reg. 13,883 (Apr. 3, 1978). These regulations applied only to the 1978 whaling season and expired on Dec. 31, 1978. The NMFS promulgated regulations for the 1979 whaling season on Apr. 3, 1979, 44 Fed. Reg. 5916, and amended them in Oct., 1979. 44 Fed. Reg. 59,911 (Oct. 17, 1979). The 1979 regulations expired on Dec. 31, 1979. The NMFS published proposed regulations for the 1980 whaling season on Jan. 22, 1980. 45 Fed. Reg. 4365. These whaling regulations are codified at 50 C.F.R. § 230.70.

181. 43 Fed. Reg. 9486 (Mar. 8, 1978).

182. *Id.* The Eskimos responded to these 1978 regulations by filing suit challenging the authority of the IWC to regulate subsistence whaling by Native Alaskans. *Hopson v. Kreps*, 462 F. Supp. 1374, 1375 (D. Alas. 1979). The Eskimos also alleged that the United States violated its trust responsibilities to Native Alaskans by issuing the regulations and that the regulations violated the MMPA and the ESA. *Id.* at 1376. The court held that the NMFS regulations promulgated to enforce the IWC schedule "are so directly linked to the conduct of U.S. foreign affairs that this court lacks the subject matter jurisdiction to review their validity." *Id.* at 1382.

While the court recognized that "the fate of [the Eskimos'] endangered culture is tragically linked to the survival of the endangered whale," the court noted that "[t]he

portunity to a village to secure needed food as essential to establishing a scheme which serves to protect the Bowhead whale stocks while reducing the risk that a village would violate the quota if that village considered it necessary to meet critical nutritional needs.¹⁸³

The 1978 NMFS whaling regulations allocate quotas for whales landed and whales struck to each whaling village.¹⁸⁴ Each whaling captain¹⁸⁵ must obtain a \$100¹⁸⁶ license from the NMFS.¹⁸⁷ While issuance of a license is discretionary,¹⁸⁸ no standards for refusal are given. The NMFS may suspend any license if it determines "that a change in circumstances resulting from unauthorized whaling activities in 1978 creates an emergency presenting an imminent hazard to the viability of the bowhead population."¹⁸⁹

very nature of executive decisions as to foreign policy is political, not judicial." *Id.*, citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103, 111 (1948). The court stated, "determining the possible consequences of judicial action in this case involves 'large elements of prophecy' [the court had noted the possible foreign policy consequences of an injunction against enforcement of the regulations earlier in its opinion] more appropriate for the Executive who has the responsibility and the resources to determine the relationship between the bowhead whale regulations and other aspects of American foreign policy." *Hopsen v. Kreps*, 462 F. Supp. 1374, 1382 (D. Alas. 1979). The court further observed that even a decision that the IWC had jurisdiction over Native Alaskan subsistence whaling "may lock the government into a position it would find difficult to reverse in the future." *Id.* The court optimistically concluded that "[c]ontinued tolerance of the subtleties and pace of diplomacy may bring an increased quota and at the same time preserve the population of whales essential for the continued vitality of the whaler's culture." *Id.* at 1382.

183. 43 Fed. Reg. 9486 (Mar. 8, 1978).

184. The quotas for 1978 are: Kattovik—1 whale landed or 2 struck; Nuigsut—0 whales landed or 0 struck; Barrow—3 whales landed or 4 struck; Wainwright—2 whales landed or 2 struck; Kivalina—1 whale landed or 2 struck; Gambell—1 whale landed or 2 struck; Savoogna—1 whale landed or 2 struck; and Wales—1 whale landed or 2 struck. 43 Fed. Reg. 13,887 (Apr. 3, 1978).

185. "Whaling captain" is defined as "any Indian, Aleut, or Eskimo domiciled in a whaling village who is in charge of a vessel and a whaling crew." 50 C.F.R. § 230.71(a)(6).

186. 43 Fed. Reg. 13,886 (Apr. 3, 1978).

187. *Id.* The applicant must give his name, address, telephone number (if any), village of domicile, a statement that he understands the regulations and will comply with them, a statement that the whaling crew contains at least five members, a statement that any vessel to be used contains adequate whaling equipment and adequate provisions for the whaling crew, a statement that no member of the whaling crew will receive money for participating in native subsistence whaling, and a description of the distinctive marking to be placed on each harpoon, lance, and explosive dart. *Id.*

188. "A license *may* be issued to a whaling captain. . . ." *Id.* (emphasis added).

189. *Id.*, at 13,886-87.

Whaling for any calf¹⁹⁰ or any Bowhead whale accompanied by a calf is prohibited.¹⁹¹ Whaling may not be accomplished in a wasteful manner.¹⁹² Whaling captains must use a harpoon, lance, or explosive dart which bears a permanent distinctive mark identifying the captain as its owner.¹⁹³ Each whaling captain must maintain a written record of his whaling activities¹⁹⁴ and must provide "an oral or written report within 12 hours of the striking, attempted striking, or landing of a bowhead."¹⁹⁵

The term "whaling" means "the hunting, striking, harassing, killing, or landing of bowheads, but does not include the salvage or processing of any stinker."¹⁹⁶ At first glance, it seems odd that

190. "'Calf' means any bowhead which is less than 21 feet in length as measured from the point of the upper jaw and the notch between the tail flukes." 50 C.F.R. § 230.71(4).

191. 50 C.F.R. § 230.72(b). The IWC established this prohibition. 43 Fed. Reg. 13,884 (Apr. 3, 1978).

192. 50 C.F.R. § 230.72(c). "'Wasteful manner' means a method of whaling which is not likely to result in the landing of a struck bowhead or which does not include all reasonable efforts to retrieve the bowhead." 50 C.F.R. § 230.71(a)(11).

"The general proscription of wasteful manner in these final regulations contemplates the prohibition of whaling activities generally recognized as wasteful. The use of a rifle to strike a bowhead whale clearly is not likely to result in its landing and, therefore, falls within this proscription. Similarly, the use of a shoulder gun without implanting in the whale a dart with line and float attached, which could result in the loss of the whale, would be a violation of the regulations." 43 Fed. Reg. 13,885 (Apr. 3, 1978).

"Due to the manner in which a proprietary interest in a whale is established (*i.e.*, by using a darting gun to implant in the whale a dart with line and float attached), the great social value attached to this interest, and the limited number of whales that may be taken, NMFS has determined that detailed Federal regulations to supplement those regulations by which the Eskimos govern their whaling activities are not necessary to ensure that proper hunting methods are employed." *Id.*

193. 43 Fed. Reg. 13,886 (Apr. 3, 1978).

194. *Id.* at 13,887. The report must include "(1) The number, dates and locations of each strike, attempted strike, or landing; (2) The length (as measured from the point of the upper jaw and the notch between the tail flukes, and the sex of the bowhead(s) landed; (3) The length and sex of a fetus, if present in a landed bowhead; (4) An explanation of circumstances associated with the striking or attempted striking of any bowhead not landed; and (5) The number of bowhead sighted by the whaling captain or any member of the whaling crew." *Id.*

195. *Id.* The written record consists of the information described in note 194.

196. *Id.*, at 13,886. "'Stinker' means a dead unclaimed bowhead found upon a beach, stranded in shallow water, or floating at sea." 50 C.F.R. § 230.71(a)(7). Stinkers do not count against the quota except where a harpoon, lance, or dart containing the mark of whaling captain is found in the whale's body. *Id.* at 13,887.

Salvaging stinkers may be done by "any person" subject to the conditions that (1) "any person salvaging a stinker shall submit to the . . . NMFS an oral or written report describing the circumstances of the salvage within 12 hours of such salvage" and that (2) "each harpoon, lance, or explosive dart found in or attached to the stinker shall return

“harassing” of whales is a permitted activity by licensed whaling captains. At the suggestion that harassing be deleted from the definition of whaling, NMFS responded by observing:

While whaling captains may not harass whales, it is important to note that the activities of others not party to a village whaling operation be subject to control. This is to ensure that only the permitted taking of bowhead whales occurs, and that no activity interferes with the successful landing of any bowhead whale struck. Activities such as shooting at whales from shore with rifles, which, as one commentator asserts takes place, or buzzing whales with airplanes are prohibited by retaining the word “harassing” in the definition of “whaling.”¹⁹⁷

Whaling captains must cease whaling operations when the number of Bowheads struck or landed by whaling captains domiciled in a whaling village equals the quota set for that village.¹⁹⁸ If for any reason village quotas are not reached, the remaining quotas may be reassigned to a second village by the NMFS at the request of that village.¹⁹⁹

In April 1979 the NMFS issued its 1979 regulations²⁰⁰ which increased the quotas to 18 whales landed or 27 struck as specified by the IWC at the IWC’s June 1978 meeting.²⁰¹ The reason cited for the increased quotas was the observation of 1,700 Bowhead whales off the Alaskan coast during the spring 1978 migration, thus yielding a best available estimate of 2,264 Bowheads, rather than the population estimate of 1,300 which was used by the IWC in developing its 1978 quotas.²⁰²

Other than the change in quotas, there are few differences between the 1978 and the 1979 regulations. The 1979 regulations grant a license to all whaling captains.²⁰³ Whaling captains are prohibited from whaling without an adequate crew or without

the device to the owner thereof. . . .” When such a device is returned to its owner there is a rebuttable presumption that the stinker is counted against the quota. *id.*

197. *Id.* at 13,885.

198. *Id.* at 13,887.

199. *Id.* The NMFS must consult with as many whaling villages as time reasonably permits before reassigning the quotas. The NMFS is to give preference to the village of Nuigsut.

200. 44 Fed. Reg. 19,408 (Apr. 3, 1979).

201. *Id.* See note 177 for the Eskimo response to this quota.

202. *Id.* at 19,409.

203. *Id.* at 19,410. “A whaling license is hereby issued to all whaling captains.” No fee is charged.

adequate supplies and equipment.²⁰⁴ "No person may receive money for participation in native subsistence hunting."²⁰⁵ Where possible, whaling captains must provide specimens from landed whales.²⁰⁶

In October 1979 the NMFS amended the 1979 regulations to require the NMFS to monitor the whale hunt and to keep track of the number of Bowheads landed and struck.²⁰⁷ When the total quota for all villages is reached, the NMFS may declare the whaling season closed by publication in the *Federal Register*.²⁰⁸ On the same day, NMFS issued notice of the closing of the 1979 whaling season.²⁰⁹

NMFS published its proposed 1980 regulations on January 22, 1980.²¹⁰ The 1980 quotas are 18 whales landed or 26 struck, whichever occurs first.²¹¹ This is a reduction from the 1979 quotas by one whale struck. There are no other significant changes from the 1979 scheme.

Eskimo Regulation of Whaling

The Alaskan Eskimo Whaling Commission (AEWC) was created on September 1, 1977, in Barrow, Alaska.²¹² "For the first time in recorded Eskimo history, Alaska Eskimo whaling captains from nine remote whaling villages gathered in one place to discuss the ways in which the Eskimo community might respond to the International Whaling Commission's ban on subsistence hunting of the bowhead whale."²¹³ The Eskimos cited the need to emphasize and reinforce even the most ingrained traditions, particularly when outside forces are promoting social change, to counter the perceived dissemination of misinformation concerning the manner in which most Eskimos hunt and use the Bowhead, and to investigate and study the Bowhead whale to in-

204. *Id.*

205. *Id.*

206. *Id.* Providing specimens is an important step in developing a scientific data base from which to study the Bowhead. Ultimately, this should lead to the setting of quotas which will not threaten the Bowheads' existence.

207. 44 Fed. Reg. 59,911 (Oct. 17, 1979).

208. *Id.* One wonders how many whaling captains read the *Federal Register* daily.

209. *Id.*

210. 45 Fed. Reg. 4365 (Jan. 22, 1980).

211. *Id.* at 4367.

212. SPECIAL REPORT, *supra* note 78, at A-5.

213. *Id.*

sure the continuing existence of both the Bowhead and Eskimo society.²¹⁴ The stated purposes of the AEW C are:

- (1) To insure that bowhead whale hunting was conducted in a traditional, non-wasteful manner;
- (2) To communicate to the outside world the facts concerning bowhead whale hunting, the way it was done, the centrality of the hunt to the cultural and nutritional needs of the Eskimo, the Eskimo's knowledge of the whale, and the reasons why any moratorium on such hunting would have disastrous impact upon the Eskimo community; and
- (3) To promote extensive scientific research on the bowhead whale so as to insure its continued existence without unnecessary disruption of Eskimo society.²¹⁵

On December 5, 1977, the AEW C adopted a regulatory program designed to insure that traditional Eskimo hunting methods will be allowed and that the number of whales struck-but-lost will be substantially reduced.²¹⁶ Specifically, the purposes of the AEW C are to: "(1) insure an efficient subsistence harvest of bowhead whales; and (2) provide a means within the Alaskan Eskimo customs and institutions of limiting the bowhead whale harvest in order to prevent the extinction of such species."²¹⁷

The AEW C scheme requires each whaling captain to register with the AEW C.²¹⁸ Each whaling captain must keep a written record of the number of whales attempted to be harvested, harvested, and sighted, as well as the size of such Bowheads, any known later attempted harvest of whales which aren't harvested, and the reason for not harvesting such whales.²¹⁹ In addition, each whaling captain must make "such other reports as the AEW C requires in order to accomplish the purposes of the regulations herein or in order to advance the scientific knowledge of the bowhead whale."²²⁰

214. *Id.*

215. *Id.* at A-6.

216. *Id.* at A-7. The AEW C regulations were promulgated prior to the IWC and subsequent NMFS regulations.

217. *Id.* at A-11.

218. *Id.* at A-12. The captain must disclose "his name, address, age, qualifications as captain, names of crew members, and his willingness to abide by the regulations of the AEW C and to require his crew to abide by those regulations." *Id.*

219. *Id.* at A-13.

220. *Id.*

The AEWC is empowered to specify the levels of harvest and attempted harvest for each whaling village.²²¹ "The AEWC shall not establish levels of harvest or attempted harvest greater than the carrying capacity of the bowhead whale stock. . . ."²²² The carrying capacity is to be determined by a scientific committee consisting of "nine members who are qualified by reason of their education and experience to make objective determination concerning the carrying capacity of the bowhead whale stock."²²³

Hunting methods are restricted to the "traditional harvesting manner," which means:

- (1) only traditional weapons shall be used
- (2) the bowhead whale may be struck with a harpoon or darting gun with line and float attached or simultaneously with harpoon and shoulder gun or darting gun.
- (3) the shoulder gun may be used
 - (i) when accompanied by harpoon with or without a darting gun,
 - (ii) after a line has been secured to the bowhead whale, or
 - (iii) when pursuing a wounded bowhead whale with a float attached to it.
- (4) the lance may be used after a line has been secured to the bowhead whale.²²⁴

"Traditional weapon" means a harpoon with line attached, darting gun, shoulder gun, lance, or other weapon approved by the AEWC with the concurrence of the Scientific Committee, as such a weapon in order to improve the efficiency of the bowhead whale harvest.²²⁵

The AEWC may prohibit any person whom it determines has violated the AEWC regulations from harvesting or attempting to harvest the Bowhead whale for a period of not less than one whaling season nor more than five whaling seasons.²²⁶ The AEWC may assess a fine of not more than \$1,000 for willful

221. *Id.* at A-14.

222. *Id.*

223. *Id.* Three of the nine members shall be members of the Eskimo community recommended by the AEWC. All members are appointed by the Polar Research Board of the National Academy of Sciences. *Id.*

224. *Id.* at A-12.

225. *Id.*

226. *Id.* at A-15.

violations.²²⁷ Since its inception, the AEW C regulations have been honored by all Eskimo whalers.²²⁸

The regulation of the taking of Bowhead whales by Eskimos is a significant step toward preserving the Bowhead whale. By setting quotas based on scientific data, the IWC and the AEW C can assure the continued existence of the Bowhead, provided their data are accurate. The NMFS regulations attempt to implement the IWC regulations in a manner that is equitable and as consistent with traditional native whaling practices as possible, while recognizing the importance of self-regulation by the AEW C. The degree to which these regulatory schemes succeed in preserving the Bowhead will determine the degree to which the Eskimo whaling culture will survive. Significantly, the responsible attitude of the AEW C and its members in accepting the IWC quotas, the NMFS regulations, and the AEW C plan has enhanced the stature of Eskimo whalers.

Conclusion

It is clear that more study of the Bowhead whale is required to determine what population level is desirable to ensure the continued existence of the whale and to allow Eskimos to continue to take surplus whales. By invoking the statutory authority to control Eskimo whaling under the Whaling Convention Act, the National Marine Fisheries Services implicitly created a regulatory scheme to husband whales so as to generate a reasonable sustainable yield for consumption by Eskimos.

The achievement of this goal depends upon setting whaling quotas that are designed to preserve and enhance Bowhead stocks. In light of the endangered status of the Bowhead, it seems imperative to generate sufficient information pertaining to the habits and habitat of *Balaena mysticetus*, thus assuring that the quotas set are based on sound principles of husbandry.²²⁹ Both

227. *Id.* No harvesting or attempted harvesting is permitted until the fine is paid. In light of the depressed economic condition of most Eskimos, a \$1,000 fine represents a substantial disincentive to violate the AEW C regulations.

228. *Id.* at A-7.

229. Research on Bowhead whales is being conducted by the NMFS and others. A recent paper which presents a fascinating study of the growth of Bowhead whales from conception to yearling is Durham, *Early Development and Reproduction in the Bowhead Whale, Balaena mysticetus* (draft, 1979) (unpublished manuscript available from the NMFS). See also Brohan & Krogman, *Population Biology of the Bowhead (Balaena mysticetus) and Beluga (Delphinapterus leucas) Whale in the Bering, Chukchi and Beaufort Seas*, U.S. Dep't of Commerce (1977).

the IWC and the AEWC regulations recognize this need for accurate information as a primary objective.

The key to preserving the Eskimo culture is maintaining a healthy, viable Bowhead population. Only in this manner can the Eskimos continue to integrate traditional cultural values into a modern lifestyle.